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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. 600

HERMAN LEE ROSS,
Petitioner

v.

THE STATE OF TEXAS,
Respondent

On Writ of Certiorari to the Court of Criminal Appeals of the State of Texas

BRIEF FOR THE STATE OF TEXAS, RESPONDENT

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THE STATE OF TEXAS,
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On Writ of Certiorari to the Court of Criminal Appeals of the State of Texas

BRIEF FOR THE STATE OF TEXAS, RESPONDENT

PRELIMINARY STATEMENT

Petitioner, Herman Lee Ross, a Negro, was indicted and tried for murder in the District Court for Galveston County, Texas. He was found guilty, and the death penalty was recommended by the jury after the introduction of evidence which Petitioner does not content was insufficient to sustain the verdict.[1]

[1] Because this appeal is *in forma pauperis*, and in the interest of brevity, Respondent did not object to the preparation of a Transcript of Record in this Court which omits the portion dealing with the facts of the crime. Petitioner was found guilty of shooting Guido Nesti, keeper of a package store, while the victim was standing with his hands upraised. At the time he was arrested, Petitioner shot at

Petitioner filed a motion to quash the indictment on the ground that he was denied the equal protection of laws and due process of the law guaranteed by the 14th Amendment to the United States Constitution. As grounds for these contentions Petitioner alleged in his motion that only two Negroes have served as grand jurors in Galveston County in the thirty years preceding Petitioner's indictment and that no Negro served on the grand jury which indicted the Petitioner. (R. 1-2.)[2] No testimony was produced in support of the motion to quash, but counsel for the State and for Petitioner entered into a stipulation as to the facts which would be used to review and determine the merits of the motion. (R. 4-8.) The motion to quash was overruled by the trial court.

Appeal was taken to the Texas Court of Criminal Appeals, the court of last resort in criminal matters. That court affirmed the conviction and the action of

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the arresting officers and severely injured two of them. In its opinion the Texas Court of Criminal Appeals stated:

> "The facts of this case show without dispute a murder for the purpose of perpetrating a robbery. The appellant is a negro, his victim a white man, an Italian by birth. In addition to the circumstances of the crime, appellant's own witness placed on the stand by his attorney to testify in his behalf, Dr. E. A. Etter, testified that he had known appellant all of his life; that he had long been a sufferer from tuberculosis and syphilis; that: 'He had been an outcast, a waif of society, * * *.' He said that appellant had a tendency to kill and wanted to kill, and that he had never mixed with society or made any contribution to it." (R. 9-10.)

[2] References throughout this brief are to the printed Transcript of Record dated March 31, 1951.

the trial court in overruling the motion to quash the indictment.[3]

The single point raised by the petition for certiorari is that it was error for the Texas court to affirm the conviction since Petitioner is a Negro and "no Negroes were called for grand jury service in the instance case."

STATEMENT OF THE CASE

The method of selection of grand jurors, as provided by the Constitution and statutes of Texas,[4] has recently been reviewed by this Court and its validity accepted.[5]

Petitioner does not now attack the validity of this method of selection. The stipulation between counsel for the State and Petitioner contains several paragraphs which are pertinent to the points to be raised in this reply and which set out the background upon which this case must be decided.

Since the "Stipulation of Fact" in this cause is

[3] *Ross v. State*, 233 S. W. 2d 126 (1950, not yet officially reported). In its original opinion the Texas Court of Criminal Appeals reversed the judgment of the Trial Court and dismissed the prosecution. (R. 8-10.) On motion for rehearing by the State, the Court set aside its original opinion and affirmed the judgment of the Trial Court, stating: "It is our judgment that this appellant has received a fair and impartial trial as he admits, and thus believing, the State's motion for a rehearing is granted, the order of reversal is set aside, and the judgment is now affirmed." (R. 13-20.)

[4] Section 13, Article V and Section 19, Article XVI, Texas Constitution; Articles 333, 335, 336, 338, 339, 340, and 344, Texas Code of Criminal Procedure (Vernon, 1948). These constitutional and statutory provisions are set out in the Appendix at pages 21 to 23.

[5] *Akins v. Texas*, 325 U.S. 398 (1945); *Cassell v. Texas*, 339 U.S. 282 (1950).

set out in its entirety in the printed Transcript of Record (R. 4-8.), only those paragraphs which are pertinent to the argument to be made in this brief and which, it is felt, state the material facts of the case will be here set out. They are:

5.

"For a period of 30 years next preceding the return of the indictment in this cause only two Negroes have served as grand jurors in Galveston County."

6.

"The grand jury that indicted defendant in this cause consisted of 12 white men."

8.

"In the selection of petit or trial juries Galveston County is now and for many years has been governed by Articles 2094-2095, R.C.S. of Texas, which statutes are made a part hereof by reference known as the Jury Wheel Law...."

9.

"The defendant makes no contention that any discrimination is now or has ever been practiced in Galveston County against the placing in the jury wheel of the names of all Negroes residing in the county whose names appear on the tax lists. Defendant agrees that the names of all Negroes residing in Galveston County whose names appeared on the tax rolls on the first of August preceding the return of the in-

dictment in the instant case were placed in the jury wheel as required by law."

11.

"In short, it is agreed that in so far as the selection, drawing and summoning of petit or trial juries are concerned there is not now and has not been for many years any discrimination against Negroes in Galveston County."

13.

"Of the panel drawn for the trial of the defendant 82 men appeared and qualified of which number, 13 were Negroes, being approximately fifteen (15%) per cent. Seven Negroes were examined before the jury to try defendant was completed. Of these seven, four were peremptorily challenged by the State, one was excused by the Court because of sickness and two were challenged for cause, because opposed to capital punishment. When the jury of twelve were completed, there remained six Negroes on the unexamined panel. Defendant used twelve peremptory challenges, the State used six."

14.

"That after the return of the indictment in the instant case, to-wit: the December, 1948 grand jury, two Negroes were appointed, and served; on the February, 1949 grand jury, one Negro was selected by the Commissioners but claimed his legal exemption because of being a practicing physician."

It is thus seen that in the selection of grand juries in Galveston County in the thirty years preceding the

indictment of Petitioner, two Negroes served as grand jurors. There is no indication in the stipulation as to when these two Negroes served, hence it may well be that there was one Negro on each of the last two grand juries preceding that which indicted Petitioner, or it may be that there were two Negroes on the last grand jury prior to the one which returned the indictment in this cause. It is stipulated that no Negro served upon the grand jury which indicted Petitioner; however, it is also stipulated that two Negroes served upon the next grand jury and one Negro was called for the grand jury following but asked to be excused, (R. 8.) each of these grand juries being after Petitioner's indictment on August 16, 1948, but prior to Petitioner's motion to quash the indictment on March 15, 1949.

It is stipulated that there is no discrimination against Negroes in "the selection, drawing and summoning of petit or trial juries" in Galveston County. (R. 7.) In other words, Petitioner's contention is that there is discrimination in the selection of grand juries but no discrimination in the selection of the juries which try the cases and decide upon the guilt or innocence of the accused, and his conviction should be reversed. Indeed, in the trial jury which participated in the case against the Petitioner, there were six Negroes upon the unexamined panel after the jury was selected. Petitioner used only twelve of his fifteen peremptory challenges, hence Petitioner could have, had he desired, challenged three of the white jurors in an attempt to secure Negroes upon the trial jury.

POINT ONE

There being no intentional or systematic exclusion of Negroes in the selection of the trial jury which found Petitioner guilty, the lack of Negroes among the jury commissioners and upon the grand jury, whose function is merely the returning of an indictment, is harmless error.

Argument and Authorities

This case is unprecedented. A precise parallel to this case is not to be found in the cases cited by Petitioner, and the point here argued has not been raised under similar circumstances by the respondents in prior cases decided by this Court.

In *Strauder v. West Virginia*, 100 U. S. 303 (1880), the State's *statute* provided that *no* Negro was eligible to be a member of any grand or petit jury. The stipulation in the case at bar shows Negroes have been grand jurors and petit jurors in Galveston County.

In *Neal v. Delaware*, 103 U. S. 370 (1881), the State conceded that Negroes had always been excluded from grand and petit juries because of their race and color. The stipulation in our case (R. 4-8.) reveals no such state of affairs in Galveston County, and the State denies any such conditions there exist.

In *Carter v. Texas*, 177 U. S. 442 (1900), a case from Galveston County, no Negro had ever served on the grand jury and there was an unlimited tender of evidence to support allegations of discrimination in the selection of the grand *and petit* juries. The State made no denial, but the trial court refused to hear

any evidence on the issue and overruled the motion. In the present case, the State denied discrimination because of race and color, and the trial court received all of the evidence which was tendered, the stipulation in this record. (R. 4-8.) This evidence makes no showing as to the conduct and procedure of the jury commissioners, but does affirmatively show the selection and summoning of the petit jury to have been free of any racial discrimination. (R. 8.)

In *Norris v. Alabama*, 294 U. S. 587 (1935) there was direct evidence of racial discrimination in the selection of grand jurors by designating the name of every Negro on a preliminary list of prospective jurors by placing "col." after these names. Furthermore, there had been no Negro grand jurors within the memory of any of the witnesses, it was shown that Negroes had been excluded from *any* jury service for many years, and an attempt appears to have been made to tamper with the jury roll by adding names of Negroes after the issue of discrimination was made. The stipulated facts in the case at hand reflect no such unrebutted and patently aggravated situations; the converse appears from the presence of Negro grand jurors in Galveston County both before (R. 5.) and after (R. 8.) the grand jury which returned this indictment.

In *Pierre v. Louisiana*, 306 U. S. 354 (1939) the allegations of racial discrimination in selection of both grand and petit jurors were accompanied by tenders of witnesses and were *uncontested.* Although both grand and petit jurors were selected from the

same panel, the lower court quashed only the petit jury. The State argued that the composition of the grand jury could not affect the accused's Constitutional rights. Here we find our nearest parallel to the instant case because this Court held it to be already *established* that grand juries must be selected without discrimination, citing *Neal v. Delaware* and *Norris v. Alabama*, above. But careful examination makes it obvious this *Pierre Case* and the present case are by no means alike or parallel: There had been but a single Negro called for *any* jury service and *no* Negroes at all selected for grand jury service within the memory of any witnesses in this Louisiana parish, where Negroes made up substantially one-half of the population; the authorities cited were not cases decided squarely and standing alone upon *grand jury* discrimination; and, no cogent reasons were advanced to show how the grand jury's composition "would work that fundamental unfairness which is at war with due process."[6] The stipulated facts which govern the State and Petitioner in this case show Negro grand jurors serving before and after the time of Petitioner's indictment and particularly show Negroes called to serve on two grand juries immediately prior to the presentation of the motion to quash, they show petit jurors selected without discrimination, and they show thirteen Negroes on the panel from which the petit jury which convicted Petitioner was selected.

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[6] This quotation from *Lisenba v. California*, 314 U.S. 219, on due process of law was held to have identical application to equal protection of the laws in *Akins v. Texas*, 325 U.S. 398, 402.

In *Smith v. Texas*, 311 U. S. 128 (1940), the proposition that a defendant's rights are substantially violated by discriminatory selection of the grand jury was *not challenged*, and evidence of discrimination was found. In the present case, on the other hand, Respondent urges that a lack of Negro grand jurors is harmless to Petitioner, and the stipulations in this record further distinguish this from the *Smith Case*.

In *Hill v. Texas*, 316 U. S. 400 (1942), no Negro had been on a grand jury for sixteen years, and the State offered no evidence upon the issue of racial discrimination in selecting the grand jury. The jury commissioners testified to their lack of knowledge respecting Negroes qualified for grand jury service. Without discussion upon the manner in which these facts denied the rights of the Petitioner, it was held the failure of the jury commissioners to inform themselves respecting the qualifications of available Negroes was itself discriminatory. The stipulations in the present case do not refer to the knowledge or practices of the jury commissioners, and, these matters not being at issue, it must be assumed that these jury commissioners properly did their duty in this regard. It is significant that the Court in *Hill v. Texas* stated that *Neal v. Delaware*, *supra*, was "a case substantially like the present," although the *Neal Case* involved a clear showing that all Negroes had always been excluded both from grand jury service and from petit jury service; the Court in the *Neal Case* explained the right to which the accused was entitled was to have no racial discrimination "in

the selection of jurors *to pass upon his life, liberty, or property,*" a function *grand* jurors do not perform.

In *Akins v. Texas*, 325 U. S. 398 (1945), issue was not joined on the precise question of the manner in which equal protection of the laws was denied by discriminatory grand juror selection. The majority opinion of this Court was that the facts in that case did not establish racial discrimination, while Mr. Justice Murphy was of the opinion that the facts revealed a systematic intention to select one Negro on each grand jury. The stipulations under review here show no evidence of systematic limitation. If any discrimination at all appears, which Respondent denies, it is urged to be but harmless error as to the Petitioner.

In *Cassell v. Texas*, 339 U. S. 282 (1950), the Court divided upon what facts revealed racial discrimination in selecting the grand jury. The two views were (1) that discrimination appeared because the jury commissioners revealed failure to familiarize themselves fairly with the qualifications of eligible jurors without regard to race and color and (2) that discrimination appeared because the jury commissioners mistakenly felt a single Negro on each grand jury was the desired result. The stipulations in the present case distinguish this from the *Cassell Case* because the facts here present no evidence on the manner in which individual jury commissioners discharged their duties. Although the issue was not urged by the pleadings of Respondent, Mr. Justice Jackson asserted in his dissent in

the *Cassell Case* the view now urged by Respondent. Respondent now urges this view because for the first time the true significance of alleged past discrimination in grand juror selection appears in an isolated and revealing setting.

It is well established that the use of a grand jury is optional with the several States and that indictment by grand jury may be abolished and indictment by information or complaint substituted.[7] The Texas Court of Criminal Appeals took judicial notice of the fact that

> "We have known of none ever having held such position [county attorney] in our memory save white persons. All judges since the days of the Reconstruction, as well as Justices of the Peace, and also Legislators, have been white persons; and it is only left as a matter of speculation how far the deeds of our fathers shall be the basis of an assumption of misdeeds for the present generation." (R. 18.) (233 S. W. 2d 126, 131.)

Thus, should Texas abolish the grand jury and establish a procedure in felony cases of commencement by information issued by a magistrate, justice of the peace, judge, or whoever shall be denominated the issuing officer, the question of discrimination against Negroes in the selection of those *elected* officials would not arise. This would be true even though the persons who hold the office from which the information or complaint is issued would in each case be a member of the white race.

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[7] *Hurtado v. California*, 110 U.S. 516 (1883).

A grand jury in Texas has only one function. It may either return an indictment against a defendant or refuse to indict him. The duties of a Texas grand jury are set out in Article 381, Texas Code of Criminal Procedure, as follows:

> "The grand jury shall inquire into all offenses liable to indictment of which any member may have knowledge, or of which they shall be informed by the attorney representing the State, or any other credible person."[8]

It is not incumbent upon the grand jury to hear the testimony of any witnesses other than those appearing for the prosecution. Based upon this evidence its sole function is to decide whether an indictment shall be presented. In the event of presentation of an indictment, no presumption is created as to the guilt of the accused. Indeed, the presumption of innocence continues throughout the trial, and each element of the crime for which the accused has been indicted must be proved beyond reasonable doubt before a trial jury. On the other hand, should the grand jury decide that the accused has not committed the act which is brought to its attention, it can refuse to return an indictment, this being known in Texas as a "no bill."

An indictment is no evidence of guilt and cannot be so considered. It is a completely isolated incident from the trial itself, and is merely an antecedent step. In this regard, the grand jury is largely an arbitrary and autonomous body, granted the latitude

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[8] Texas Code of Criminal Procedure (Vernon, 1948).

to indict or not upon any quantity or quality of evidence. There is no jeopardy in a no bill, and the mere failure to indict does not act as a bar to the State's attorneys presenting the same evidence to other grand juries selected in the county. There being no statute of limitations on murder,[9] this would mean that in the instant case the prosecuting attorney of Galveston County could have attempted indefinitely to secure an indictment against the Petitioner. Even under the doctrine as established by this Court, it is entirely possible and highly probable, without successful contention of systematic exclusion or limitation, that in the future there will be a grand jury without a Negro serving.

Inherent in the cases decided by this Court is the assumption that Negro grand jurors would not return an indictment against an accused simply because the accused was also a Negro, even though the same evidence would lead other qualified persons to indict. This, it is contended, is an unreasonable assumption. But even with this assumption, the State's attorney could overcome this bar by waiting for a grand jury composed entirely of white persons. Even under the present grand jury system in Texas it is not necessary that all the members of a grand jury vote to indict. The Texas statutes provide that nine members of a grand jury may indict.[10] Thus, assuming the correctness of the Court's assumption and assuming that members of the Negro

[9] Article 180, Texas Code of Criminal Procedure (Vernon, 1948). Appendix, page 21.

[10] Articles 391 and 393, Texas Code of Criminal Procedure (Vernon, 1948). Appendix, at page 24.

race served upon every grand jury, it would not necessarily mean that the grand jury would be compelled to refuse to return an indictment against a member of the Negro race.

These propositions, when coupled with the fact that *all* the members of a trial jury must vote for conviction while only nine members of a grand jury need join in an indictment, serve to fortify the proposition that the absence of a Negro from the grand jury which indicted Petitioner was harmless error in view of the complete lack of discrimination over a long period of time in the selection of trial juries. The holding of the Texas courts in the instant case may seem to be based mainly upon the same propositions that were presented in the dissent of Mr. Justice Jackson in *Cassell v. Texas*, 339 U.S. 282 (1950), but in the *Cassell Case* there was no stipulation such as in this case that "in . . . the selection . . . of petit or trial juries . . . there is not now and has not been for many years any discrimination against Negroes in Galveston County." It is respectfully urged that this Court, in the light of the stipulation in this case, consider the effect of the absence of a Negro from the indicting grand jury upon the end result of the complete trial procedure. Certainly no beneficial purpose will be served by reversing the conviction of the Petitioner in this case, making it incumbent upon the State to reindict and retry one who was convicted upon a fair trial. Should there be indicated in the present record a policy or custom of intentional and systematic exclusion of Negroes from grand jury service, the abuse could best be corrected,

as stated by Mr. Justice Jackson, in the enforcement of the existing Federal penal statutes.

And it is submitted that to find an absence of Negroes from among the jury commissioners of Galveston County violated as a matter of law the equal protection due this Petitioner would be to disregard the proper function of the jury commissioners, unrelated as it is to any given citizen who may subsequently be accused of crime; it would cast unwarranted and wholly unjustifiable reflections upon the manner in which the District Judges of Galveston County have throughout the years discharged their statutory duties in the selection of jury commissioners.

Incidentally, Petitioner seeks to qualify the language of his stipulation respecting the selection of petit jurors (R. 7.) by urging that Respondent has been guilty of racial discrimination through the exercise by the State's attorneys of their peremptory challenges. The stipulation must, of course, speak for itself. The identical contention concerning peremptory challenging of Negro jurors by the prosecution was rejected in *People v. Roxborough*, 307 Mich. 575, 12 N. W. 2d 466, 473, certiorari denied, sub nom. *Roxborough v. Michigan*, 323 U.S. 749 (1944). And it was again rejected in *Hall v. United States*, 168 F. 2d 161, 164, certiorari denied 334 U.S. 853 (1948).

POINT TWO

The practice, if any, of excluding Negroes from grand jury service having been discontinued prior to the selection of the grand jury which indicted Peti-

tioner, absence of Negroes from the grand jury returning the indictment in this cause does not constitute a denial of the equal protection of laws.

Argument and Authorities

An attempt further to review in any detail the cases concerning discrimination against Negroes in the selection of grand juries is unnecessary in view of the familiarity of this Court with the law concerning that subject. Briefly stated, this Court has held that a mixed jury in each case is not required by the equal protection clause of the Fourteenth amendment.[11] At the most, it requires only that there be no intentional and systematic exclusion of Negroes from grand jury service solely because of race.[12] Systematic exclusion may be shown by a long continued exclusion of Negroes from grand jury service.[13]

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[11] *Martin v. Texas*, 200 U.S. 316, 320 (1906): "A different conclusion in this case would mean that, in a criminal prosecution of a negro for crime, an allegation of discrimination against the African race, because of their race, could be established by simply proving that no one of that race was on the grand jury that returned the indictment or on the petit jury that tried the accused; whereas, a mixed jury, some of which shall be of the same race with the accused, cannot be demanded, as of right, in any case, nor is a jury of that character guaranteed by the Fourteenth Amendment. . . ."

Snowden v. Hughes, 321 U.S. 1, 8 (1944): ". . . But a discriminatory purpose is not presumed . . ., there must be a showing of 'clear and intentional discrimination' . . . But a mere showing that Negroes were not included in a particular jury is not enough; there must be a showing of actual discrimination because of race."

[12] *Ibid.*

[13] *Patton v. Mississippi*, 332 U.S. 463 (1948); *Pierre v. Louisiana*, 306 U.S. 354 (1939); *Norris v. Alabama*, 294 U. S. 587 (1935).

The stipulation in this case is to the effect that two Negroes had served upon the grand juries of Galveston County in the thirty years preceding the selection of the grand jury which indicted Petitioner. It is also shown in the stipulation that Negroes have served or have been called upon the grand juries following that which indicted the Petitioner and prior to the filing of the motion to quash in this case. (R.8). Petitioner pointed out in his Motion for Rehearing in the Texas Court of Criminal Appeals that a Negro was appointed as Jury Commissioner in Galveston County in 1950 and three Negroes served on the grand jury for the June Term, 1950. There is nothing contained in the stipulation or in the record which would indicate which juries contained the two Negroes who, it is stipulated, served during the thirty-year period. Based upon the presumption that the officials of a State or county will carry out their duties in a legal manner[14] and the stipulation in this record, it is clear Galveston County has discontinued in recent years any practice of excluding Negroes from grand jury service. With these stipulations before him, it was no abuse of discretion for the trial judge to find the motion to quash was not supported by the evidence.

This being true, the cases which hold that a showing of long continued absence of Negroes from grand juries creates a *prima facie* showing of intentional and systematic exclusion of Negroes from grand jury service are not applicable here. Certainly there is some time when a county can change its policy,

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[14] *Akins v. Texas, supra; Martin v. Texas, supra.*

and upon such a change the past acts of that county will no longer cast a stigma upon its future acts. This Court has indicated that it will accept some intermediate point as a beginning point for its determination as to the existence of a custom of exclusion.[15]

This case does not reflect any unlimited tender by Petitioner of evidence to show racial discrimination in selecting this grand jury, followed by failure of Respondent to counter such a tender. On the contrary, the facts come into the record by way of a joint presentation by Petitioner and Respondent. This stipulation contains no showing that the two Negro grand jurors in Galveston County were not upon one or two grand juries just prior to the one that Petitioner argues to have been tainted by racial discrimination. And the stipulation further shows that after Petitioner's indictment (but *prior* to the time this issue was first raised by Petitioner's motion to quash) several Negroes were called for grand jury service. It may thus be fairly stated that commencing with two grand juries prior to the grand jury which indicted Petitioner and with the exception of that particular grand jury, there have been one or more Negroes on each grand jury up to June, 1950, the latest indicated in this record. There has also been a Negro Jury Commissioner in Galveston County. This clearly warranted the trial court's apparent belief that there had been an abandonment of any practice or custom which might have existed in the past, and certainly does not leave the grand jury which indicted Petitioner tainted by any intentional or systematic exclusion of Negroes. It is proper to

[15] *Cassell v. Texas, supra; Akins v. Texas, supra.*

weigh all of the evidence as to the surrounding circumstances in passing upon allegations of racial discrimination. There is no evidence that there was any element of intentional exclusion of Negroes from the grand jury which presented the indictment against Petitioner. Neither is there evidence that the jury commissioners did not fully and fairly consider all eligible citizens in the selection of this grand jury. Indeed, there is no evidence at all with regard to the selection of this grand jury. Absent a *prima facie* showing based upon past events, Petitioner's contentions must fail.

CONCLUSION

It is respectfully submitted that this case should be affirmed.

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APPENDIX

Constitutional and Statutory Provisions of Texas

Constitutional Provisions

Article V, Section 13: "Grand and petit juries in the District Courts shall be composed of twelve men; but nine members of a grand jury shall be a quorum to transact business and present bills. In trials of civil cases, and in trials of criminal cases below the grade of felony in the District Courts, nine members of the jury, concurring, may render a verdict, but when the verdict shall be rendered by less than the whole number, it shall be signed by every member of the jury concurring in it. When, pending the trial of any case, one or more jurors not exceeding three, may die, or be disabled from sitting, the remainder of the jury shall have the power to render the verdict; provided, that the Legislature may change or modify the rule authorizing less than the whole number of the jury to render a verdict."

Article XVI, Section 19: "The Legislature shall prescribe by law the qualification of grand and petit jurors."

Statutory Provisions[18]

Article 180: "An indictment for any other felony may be presented within three years from the commission of the offense, and not afterward; except murder, for which an indictment may be presented at any time."

Article 333: "The district judge shall, at each term of the district court, appoint three persons to

[18] Texas Code of Criminal Procedure (Vernon, 1948).

perform the duties of jury commissioners, who shall possess the following qualifications:

1. Be intelligent citizens of the county and able to read and write.
2. Be qualified jurors and freeholders in the county.
3. Be residents of different portions of the county.
4. Have no suit in said court which requires the intervention of a jury."

Article 335: "When the appointees appear before the judge, he shall administer to them the following oath: 'You do swear faithfully to discharge the duties required of you as jury commissioners; that you will not knowingly elect any man as juryman whom you believe to be unfit and not qualified; that you will not make known to any one the name of any juryman selected by you and reported to the court; that you will not, directly or indirectly, converse with any one selected by you as a juryman concerning the merits of any case to be tried at the next term of this court, until after said cause may be tried or continued, or the jury discharged.' "

Article 336: "The jury commissioners, after they have been organized and sworn, shall be instructed by the judge in their duties and shall then retire in charge of the sheriff to a suitable room to be secured by the sheriff for that purpose. The clerk shall furnish them the necessary stationery, the names of those appearing from the records of the court to be exempt or disqualified from serving on the jury at each term, and the last assessment roll of the county."

Article 338: "The jury commissioners shall select sixteen men from the citizens of the different por-

tions of the county to be summoned as grand jurors for the next term of the court."

Article 339: "No person shall be selected or serve as a grand juror who does not possess the following qualifications:

1. He must be a citizen of the State, and of the county in which he is to serve, and qualified under the Constitution and laws to vote in said county; but, whenever it shall be made to appear to the court that the requisite number of jurors who have paid their poll taxes can not be found within the county, the court shall not regard the payment of poll taxes as a qualification for service as a juror.
2. He must be a freeholder within the State, or a householder within the county.
3. He must be of sound mind and good moral character.
4. He must be able to read and write.
5. He must not have been convicted of any felony.
6. He must not be under indictment or other legal accusation for theft or of any felony."

Article 340: "The names of those selected as grand jurors by the commissioners shall be written upon a paper; and the fact that they were so selected shall be certified and signed by the jury commissioners, who shall place said paper, so certified and signed, in an envelope, and seal the same, and indorse thereon the words, 'The list of grand jurors selected at ..... term of the district court,' the blank being for the month and year in which the term of the court began its session. The commissioners shall write their names across the seal of said envelope, direct the same to the district judge and deliver it to him in open court."

Article 344: "Within thirty days of the next term

of the district court and not before, the clerk shall open the envelope containing the list of grand jurors, make out a copy of the names of those selected as grand jurors, certify to it under his official seal and deliver it to the sheriff."

Article 391: "After all the testimony which is accessible to the grand jury shall have been given in respect to any criminal accusation, the vote shall be taken as to the presentment of an indictment, and, if nine members concur in finding the bill, the foreman shall make a memorandum of the same with such data as will enable the attorney who represents the State to write the indictment."

Article 393: "When the indictment is ready to be presented, the grand jury shall go in a body into open court, and, through their foreman, deliver the indictment to the judge of the court. At least nine members of the grand jury must be present on such occasion."